Mun. He must have known that at some point of time the said half-share would be sold to extinguish his mounting personal debt to the first defendant. Having regard to the totality of the evidence adduced, I hold, on the authority of *Lau Hee Teah's* case *(supra)* with regard to the standard of proof, that the plaintiff has failed to discharge the burden of proof required of him to establish that the first and second defendants had by misrepresentation and/or fraud caused the said half-share to be transferred to the second defendant. Nevertheless, in view of my finding that the first defendant was the agent of and owed fiduciary duties to the plaintiff, the first defendant has certainly, to my mind, failed in his duty as agent of the plaintiff in selling the said half-share well below the market value and also in not informing the plaintiff that he had sold it at $3,500/– in 1968 to the second defendant below its market value so as to afford the plaintiff the opportunity of questioning the price especially in view of its transfer to their mutual friend, P.W.5, at $3,000/– and its subsequent transfer to the second defendant, a circumstance which would certainly have put the plaintiff on guard as to the adequacy of the purchase price of $3,000/–. I am more than satisfied that the plaintiff only came to know of the transfer to P.W.5 and the re-transfer ostensibly to the second defendant only after the family meeting at the defendants' house in November 1979, and as such I cannot see how the plaintiff can be said to be estopped or precluded by his conduct, from bringing this action.

As to the fourth issue, since the action was filed on August 27, 1981, well within twelve years of the discovery of the transactions affecting P.W.5 and the second defendant, the action, in my opinion, is not barred by either section 9 or section 22 of the Limitation Act 1953.

I come finally to the question of the moneys that are due to the plaintiff. The Chartered Valuer (P.W.4) gave evidence that the open market value of a half-undivided share of the said land in April and May 1968 was $9,100/–. In my view, it would not be appropriate in the circumstances of this case to import the comparatively recent practice of valuing real property by registered professional experts to a period when valuations were done by rather rough and ready methods prevailing at that time. I would accordingly accept the evidence of P.W.5, who was a broker in real property at the material time, and that of the first defendant that the market value of the said half-share when P.W.5 bought it from the first defendant was $6,000/–. In that event, the first defendant who sold the said half-share for the stated price of $3,000/– in fact undersold it by fifty per cent. In the circumstances the first defendant, in my judgment, has to account to the plaintiff for this short-fall after setting off what was stated by the defendant to be owing to him by the plaintiff in the region of $3,000/–. It is an agreed fact that the said land was actually sold by the first defendant to S.E.A. for $962,062.50 so that by a process of simple arithmetic the first defendant must pay the plaintiff the sum of (to make it a round figure) $240,500/–. As the sale to S.E.A. took place some time in March 1979 and the transfer registered on May 30, 1979, when it can be assumed that the whole purchase price would have been paid to the first defendant, I give judgment in the sum of $240,500/– with interest to run on this sum from June 1, 1979 at the rate of 8% per annum until the date of judgment. The plaintiff is entitled to his costs against the first defendant.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; T. Selvarasan & Co.*

PUBLIC PROSECUTOR v. MUDA BIN MOHAMED & ANOR.

[O.Cr.J. (Abdul Malek J.) November 23, 1986]

[Kota Bahru – Criminal Trial No. 2 of 1984]

Criminal Law and Procedure – Amendments to Dangerous Drugs 1952 making death sentence mandatory – Whether applicable to cases pending hearing in the Sessions Court before amendment came into force – Vested right of accused for case to be continued in Sessions Court – Dangerous Drugs Act 1952, ss. 39B, 41 & 41A.

Criminal Law and Procedure – Trial – Forum of – Trial partially heard in Sessions Court – Requisition by prosecution for case to be tried in High Court – Illegal and void.

Dangerous Drugs – Amendments to Dangerous Drugs Act 1952 making death sentence mandatory – Effect on cases pending hearing in Sessions Court before amendments came into force.

Jurisdiction – Sessions Court – Partially heard case in Sessions Court – Order of transmission to High Court illegal and void.

Both the accused in this case had been charged with trafficking in a dangerous drug *i.e.* 234 gms. of cannabis in the Sessions Court on December 12, 1982. At that point of

time the said offence did not carry the mandatory death penalty. The amendment to the Dangerous Drugs Act 1952 making mandatory death penalty upon conviction came into effect on April 15, 1983.

The issue before the present Court was whether the amendments to sections 39B, 41 and 41A of the Dangerous Drugs Act 1952 had the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the amendments.

Held: (1) both the accused had a vested right and not a procedural right for their case to be continued in the Sessions Court;

(2) despite the requisition of the Public Prosecutor, since the case had been partially heard in the Sessions Court, the order of transmission to the High Court is illegal, void and of no effect and the case should continue in the Sessions Court.

Cases referred to:

(1) *Public Prosecutor* v. *Jusoh bin Samah* (Kuantan – Criminal Trial Nos. 1 to 4 of 1984) (*unreported*). See Editorial Note at [1984] 2 M.L.J. 318, 319.
(2) *Public Prosecutor* v. *Hun Peng Khai & Ors.* [1984] 2 M.L.J. 318.
(3) *Public Prosecutor* v. *Cheah Cheng Eng* [1986] 2 M.L.J. 39, 40; [1986] 1 C.L.J. 303.

CRIMINAL TRIAL.

Mohamed Azman bin Husin (Deputy Public Prosecutor) for the Public Prosecutor.

Panir Selvam a/l Mutty for the first accused.

Sukri bin Mohamed (assigned) for the second accused.

Cur. Adv. Vult.

Abdul Malek J.: Both the accused had been charged as follows:

"That you jointly on 2nd of December, 1982, at about 12.10 p.m., at Jalan Hamzah, Kota Bharu, in the District of Kota Bharu, in the State of Kelantan, did on your own behalves traffic in a dangerous drug, to wit, 234 grammes of cannabis, and you have thereby committed an offence under Section 39B(1)(a), punishable under Section 39B(2) of the Dangerous Drugs Act, 1986.".

When the matter came up before me on November 23, 1986, counsel for the 1st accused objected to the trial being held in the High Court as it was already partially heard in the Sessions Court on July 19, 1983, before the requisition of the Public Prosecutor under section 41A(1) of the Dangerous Drugs Act 1952 dated May 8, 1984, was tendered on May 26, 1984, for the case to be tried in the High Court. Having heard the submissions of counsel for both the accused and the learned Deputy Public Prosecutor on this objection and having stood down the case to consider the matter, I made the following ruling:

(a) both the accused were charged in the Sessions Court on December 12, 1982, for the same offence which at that point of time did not carry the mandatory death penalty and since the forum of trial was the Sessions Court, the maximum sentence that could be imposed was imprisonment for life;

(b) the original consent to prosecute was dated February 2, 1983, and tendered in Court on February 28, 1983;

(c) the punishable section for the offence under the Dangerous Drugs Act 1952 was amended on April 15, 1983, and it carried the mandatory death penalty upon conviction;

(d) the trial against both the accused in the Sessions Court commenced on July 19, 1983, and two prosecution witnesses testified on that day before it was adjourned to September 7 and 8, 1983;

(e) after three postponements on September 7, October 31 and November 29, 1983, learned counsel for the defence applied to discharge himself on February 15, 1984;

(f) there was a further mention on the April 18, 1984, and, when the case was called up on May 26, 1984, the prosecuting officer applied to have the case transferred to the High Court by submitting a new consent and the requisition order of the Public Prosecutor against both accused dated May 8, 1984;

(g) the case was first mentioned in the High Court on September 28, 1984, but at the first hearing on January 20, 1986, engaged counsel for the 1st accused who has just been retained applied for a postponement – in consequence counsel assigned for the 1st accused was discharged;

(h) on October 5, 1986, counsel for the 1st accused again applied for a postponement as he had just discovered that the trial had been partially heard in the Sessions Court and wanted time to look up authorities to raise a preliminary objection to the trial in the High Court;

(i) after hearing the submissions of both counsel for the 1st and 2nd accused respectively and the learned Deputy Public Prosecutor today, the Court is of the view that the basic question to be decided is whether the amendments to sections 39B, 41 and 41A of the Dangerous Drugs Act 1952 on April 15, 1983, have the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the amendments?

(j) on this point, the then Federal Court sitting in Ipoh on July 23, 1984, had ruled that the amendment to the Dangerous Drugs Act 1952 making the death sentence mandatory for trafficking does not apply to cases pending hearing in the Sessions Court before the amendment came into force on April 14, 1983 and overruled the decision of Shaik Daud J. in *Public Prosecutor* v. *Jusoh bin Samah*;[1]

(k) in *Public Prosecutor* v. *Hun Peng Khai & Ors.*,[2] the President Sessions Court had transferred a similar case to the High Court in view of the *Jusoh bin Samah* decision without any requisition of the Attorney General and after one prosecution witness had given evidence, Edgar Joseph Jr. J. held that the orders of transmission were illegal, void and of no effect, quashed them and restored all the cases back to the Sessions Court and that decision was upheld in the Federal Court;

(l) in *Public Prosecutor* v. *Cheah Cheng Eng*,[3] the Sessions Court had transferred a similar case pending before it to the High Court upon a requisition of the Public Prosecutor under section 41A of the Dangerous Drugs Act 1952 but Mustapha Hussein J. had transferred the case back to the Sessions Court under section 417 of the Criminal Procedure Code upon an oral application by counsel for the defence;

(m) the Supreme Court held that the High Court had no power to transfer a case to the Sessions Court for trial under that section – it is pertinent to point out here that when Mr. Mutty read the concluding line of paragraph 10 of the *Current Law Journal* report the word "in" after "law" has been omitted and it gave the opposite view to its actual meaning in the correct report found in the *Malayan Law Journal* version;

(n) therefore although learned counsel for the 1st accused supported by the learned counsel for the 2nd accused had applied for a transfer back to the Sessions Court in these circumstances, this Court has no power to order a transfer to the Sessions Court for trial;

(o) however, in the same case (*Cheah Cheng Eng's*) the Supreme Court made a distinction by stating this -

> "Basically the question that arose was "Whether sections 15 and 16 of the Dangerous Drugs (Amendment) Act, 1983 which confer exclusive jurisdiction on the High Court to try offences in contravention of section 39B(1) of the Dangerous Drugs Act, 1952 have the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the amending Act?'
>
> The answer to this question is, in our view, in the negative. Cases pending trial prior to the coming into force of the amending Act may still be heard by the Sessions Court unless of course the Public Prosecutor should choose to invoke section 41A of the Act which empowers the Public Prosecutor to require any case in respect of an offence under the Act to be tried by the High Court. It is of fundamental importance therefore that a distinction be drawn between the present case and *Hun Peng Khai's* case. In *Public Prosecutor* v. *Hung Peng Khai & Ors., supra,* the case was transmitted to the High Court for trial by the Sessions Court President who felt bound by the judgment of Shaik Daud J. in Kuantan Criminal Trials Nos. 1 and 4 of 1984. This was done after the trial had commenced in that Court, *i.e.* after they had each claimed trial and one witness Sergeant Major Mokhtar had already given evidence. In that sense the accused had a vested right to have his case heard in the Sessions Court. In the instant case, however, the trial had not yet commenced and as such it cannot be said that the accused had a vested right to trial in the Sessions Court. We are of the view that so long as the case was still before a subordinate court and the trial had not yet commenced the Public Prosecutor by virtue of the power vested in him under section 41A of the Act and also under Art. 145(3) of the Federal Constitution may choose the forum for trial.";

(p) it follows that a distinction must be made between similar cases which has been partially heard in the Sessions Court and which has not been before the transmission to the High Court;

(q) in this case, the trial had commenced in the Sessions Court some ten months before the requisition order and, despite the requisition, this Court holds that both the accused had a vested right and not a procedural right for their case to be continued in the Sessions Court;

(r) although I am made to understand that the President who heard the case partly has since resigned, this does not in any way affect the principle of the forum of trial;

(s) based on the authorities cited and on the facts of this case, I would hold that despite the requisition of the Public Prosecutor, since the case had been partially heard in the Sessions Court, the order of transmission to the High Court is illegal, void and of no effect and the case should continue in the Sessions Court.

Order accordingly.

Solicitors: *Mutty & Co.; Wan Harun; Sukri & Nordin.*

PUBLIC PROSECUTOR v. PHON NAM

[O.Cr.J. (Peh Swee Chin J.) December 18, 1986]

[Ipoh – Perak Criminal Trial No. 5 of 1984]

Criminal Law and Procedure – Criminal trial – Charge of trafficking in dangerous drug – Chemist's report – Chemist not called as witness – No evidence of service of Chemist's report on accused – Accused acquitted – Criminal Procedure Code (F.M.S. Cap. 6), s. 425.

Dangerous Drugs – Evidence – Chemist report – No evidence of service on accused – Dangerous Drugs Act 1952, s. 39B(1).

In this case the accused was charged with trafficking in heroin, an offence under the Dangerous Drugs Act. At the trial evidence was given that the substances found by the police in regard to which the accused was charged were sent to the Chemistry department for analysis and the report of the Chemist was tendered in evidence. However no evidence was given of the service of the Chemist's reports on the accused by the police officer who was alleged to have served them on the accused. At the end of the prosecution case counsel for the defence said he would reserve his submission until the end of the whole case. The court then recessed to consider whether there was a *prima facie* case for the accused to be called. When hearing resumed the trial judge drew the attention of the learned Deputy who was prosecuting the case that the police officer had never given evidence about the service of the Chemist's report on the accused. The learned Deputy applied for leave under section 425 of the Criminal Procedure Code to call the police officer but this was refused.

Held: (1) as there was no evidence of the service of the Chemist's report on the accused and neither was the Chemist called to give evidence, the position at the close of the prosecution case was that there was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in were in fact heroin;

(2) having regard to all the circumstances including the court's view of the effect of the system of trial being adversarial the court did not exercise its discretion to invoke section 425 of the Criminal Procedure Code.

Cases referred to:

(1) *Ramli bin Kechik* v. *Public Prosecutor* [1986] 2 M.L.J. 33.

(2) *Public Prosecutor* v. *Yeoh Chuan Joo* (unreported)

(3) *Maxwell* v. *Director of Public Prosecutions* [1935] A.C. 309, 323.

CRIMINAL TRIAL.

Tun Abdul Majid bin Tun Hamzah (Deputy Public Prosecutor) for the prosecution.

Karpal Singh for the accused.

Cur. Adv. Vult.

Peh Swee Chin J.: The accused was acquitted and discharged without his defence being called on a legal point based on some evidence not disputed by both the prosecution and defence, and such being the case, apart from stating the barest outline of the prosecution case as a whole, but stating in detail the aforesaid undisputed evidence, it will not be necessary to set out the details of the whole prosecution case.

The accused was charged with trafficking in 128.80 grammes of heroin under section 39B(1) of the Dangerous Drugs Act. It cannot be gainsaid that it would be vital for the prosecution to prove that the substances which the police suspected to be heroin were in fact heroin, a vital ingredient of the offence in question. I do not think it necessary to cite any authority for the proposition, bearing in mind at the same time, that it was a capital offence.

There were two chemist's reports, stating that the substances found by the police and submitted to the chemist for analysis were in fact heroin, such substances having been found to be attributable to the accused.

The evidence about the chemist's reports is as follows. Insp. Mohd. Sakri bin Ariffin, (PW1), stated that he had personally sent the exhibits, in two envelopes, marked "S1" and "S2" respectively to the Chemistry Department, "S1" consisting of substances suspected to be heroin and "S2", the weighing scale and its case, (container). He produced the acknowledgment receipt he received from the chemist. On April 14, 1984, he received the said exhibits back from the chemist with chemist's reports in respect of the said "S1" and "S2" and marked by the Court respectively as P25 and P26. He further said, in regard to them: